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In The

Supreme Court of the United States

COEUR ALASKA, INC.,

Petitioner,

v.

SOUTHEAST ALASKA
CONSERVATION COUNCIL, ET AL.,

Respondents.

STATE OF ALASKA,

Petitioner,

v.

SOUTHEAST ALASKA
CONSERVATION COUNCIL, ET AL.,

Respondents.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit**

BRIEF OF THE COUNCIL OF ALASKA PRODUCERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The Council of Alaska Producers ("CAP") is an association representing major companies involved in the exploration, development, and active operation of hard rock mines in Alaska. The mining industry in Alaska produces not only vital resources for the Alaskan economy, but also serves as an important source of jobs and economic opportunities in rural and remote areas of Alaska. In 2007, the Alaska mining industry provided over 5,500 direct and indirect jobs, constituting a payroll of $340 million. Alaska Native corporations benefit significantly from mining industry activity on their land, both in terms of jobs for shareholders and through direct payments for leases of land. *See* Alaska Miners Association, *The Economic Impacts of Alaska's Mining Industry*, at 1 (January 2008).[2]

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[1] This *amicus* brief is filed with the consent of the parties. All petitioners and respondents aside from the United States have filed letters with the Clerk of the Court consenting to the filing of *amicus* briefs in accordance with the Court's Rule 37.3(a). Respondent United States' letter of consent is filed with the Clerk of the Court herewith. Pursuant to Rule 37.6, the amicus submitting this brief and its counsel hereby represent that neither party to this case nor their counsel authored this brief in whole or in part, and that no person other than *amicus* paid for or made a monetary contribution toward the preparation and submission of this brief.

[2] *Available at* http://www.alaskaminers.org/mcd07sum.pdf.

The CAP is committed to sound operating practices, protection of the environment, and growth of an industry that has the potential to provide much-needed private sector economic diversification throughout Alaska. Its members work closely with the State of Alaska and the Federal Government to promote practices that foster the environmentally-sound development and use of mineral materials. It is also engaged regularly in the progression of social causes, such as through litigation that raises environmental issues of concern to the Alaska mining community.

The CAP has a substantial interest in this case. The Ninth Circuit's decision substantially impacts mining activity in Alaska. If permitted to stand, many mines in Alaska would be forced to cease storage of mine tailings in vast areas near mining projects because mine tailings by their very nature cannot meet Clean Water Act Section 301 effluent limitations (33 U.S.C. § 1311) and Clean Water Act Section 306 new source performance standards (33 U.S.C. § 1316) promulgated by Environmental Protection Agency under Section 402 of the Clean Water Act, 33 U.S.C. § 1342. The Ninth Circuit's holding, if left standing, could result in the closure of mines in remote areas of Alaska, resulting in the loss of jobs and economic opportunities in this otherwise barren region. This result is not dictated by the Clean Water Act and indeed contradicts the requirements of the Alaska Statehood Act, Pub. L. 85-508, 72 Stat. 343, July 7, 1959. Both the U.S. Army Corps of Engineers

("Corps") and the Environmental Protection Agency ("EPA") recognized the realities facing the mining industry in promulgating the regulations and issuing the permits at issue. Unfortunately, the Ninth Circuit ignored the practical reality that mines in Alaska face when constructing and operating facilities in this area of the country and failed to harmonize the Clean Water Act with the Alaska Statehood Act. This Court should reverse the Ninth Circuit's ruling, and defer to the expertise of the Corps and EPA, which have developed a regulatory regime that addresses the relevant environmental concerns raised in this case.

STATEMENT OF THE CASE

The facts of this case demonstrate the need for deference to a reasonable interpretation of statutory terms – such as that provided by the Corps and EPA in this case.[3] The Corps and EPA, unlike the Ninth Circuit, focused on the practical implications of Clean Water Act regulations carefully balancing the environmental and economic implications of the Clean Water Act and the Alaska Statehood Act.

For over 30 years, the Corps and EPA have permitted the discharge of mine tailings into waters of the United States, including Arctic tundra and

[3] The facts summarized here are those set forth in, *inter alia*, the opinions of the District Court and the Ninth Circuit on *de novo* review.

other wetlands, pursuant to Clean Water Act Section 404 (33 U.S.C. § 1344). As described by the District Court, the novel question presented in this case is whether the Corps and EPA erred in permitting a mining company to discharge about 4.5 million tons of solid mine tailings into a remote Alaska lake, where the lake would be used as a storage facility impounding the tailings. Reclamation of the lake, including capping of tailings, is required as part of the project. Permitting requirements would insure that the lake would recover over time, providing at least equivalent aquatic habitat and productivity to that which currently exists. Ultimately, water released from the tailings impoundment into downstream receiving waters would be treated in a manner that would meet Clean Water Act Section 402 requirements. Thus, the lake in question would serve to isolate deposited tailings from the environment and would be subject to strict monitoring and reclamation requirements that meet congressional standards.

SUMMARY OF ARGUMENT

The Court should reject the appellate ruling below because the Ninth Circuit failed to consider the practical implications of its ruling on mines in Alaska, and the impending result, which Congress did not intend when enacting the Clean Water Act and the Alaska Statehood Act. The Corps and EPA have, in the light of many years of experience and

practical knowledge, fashioned a regulatory framework that both protects the environment and permits responsible development of Alaska lands and the extraction of important mineral resources. The Ninth Circuit's ruling imperils this legislative balance.

The Ninth Circuit failed to consider how the hardrock mining process is conducted in remote, inaccessible locations such as Alaska. As described by the Ninth Circuit, mine tailings are nothing more than ground up rock and earth. During the process of separating ore from this ground up rock, mined rock and earth are combined with water and chemicals to separate out ore-bearing materials. This paste-like material is sometimes placed in upland areas where it is dried out in a process called "dry stacking"; however, in many locations in Alaska, placement of tailings in upland areas is simply not feasible given the location of mining facilities, the prevalence of wetland areas in the State, and economic considerations associated with management of large quantities of tailings materials in remote locations.

By their very nature, mine tailings consist of ground up rock and particles of smaller sizes. Constituent elements of mine tailings, such as sediment materials, often exceed the Section 402 standards with which the Ninth Circuit's interpretation would require compliance. Practically speaking, it would not be possible to place most typical mine tailings on vast wetland areas in Alaska under the Ninth Circuit's rule as they would at a minimum exceed limits placed

on total suspended solids. *See* 40 C.F.R. § 440.104(a) (2007).

The Ninth Circuit failed to consider that both the Corps and EPA have developed a program to manage mine tailings in places such as Alaska in a manner that balances environmental protection with the need to foster economic development in rural areas. Under the Corps' regulations, the Corps grants permits for tailings placements *only* under stringent environmental and practicability criteria, and *only when* they will be deposited into secure impoundments that have been engineered and strictly designed for storage. Reclamation, remediation and monitoring requirements associated with these Corps permits ensure the long-term protection of the environment.

ARGUMENT

I. IMPLEMENTATION OF THE NINTH CIRCUIT'S RULING IN ALASKA WOULD HAVE FAR-REACHING, HARMFUL IMPACTS ON CURRENT AND FUTURE MINING PROJECTS

The Corps and EPA have worked for years to develop a balanced approach to dealing with wetlands issues in Alaska. The Federal Government has long recognized the fact that Alaska is different when it comes to regulating wetlands in this region of the country. The Ninth Circuit failed to carefully consider the agencies' considerable expertise in this area, or

the practical implications of its ruling, in overturning the agencies' Clean Water Act regulations concerning placement of mine tailings.

A. The Long History of Wetlands Regulation in Alaska Cannot be Ignored

Alaska is replete with many small, remote lakes and wetland areas that could be subject to regulation under the Clean Water Act. Alaska possesses about 175 million acres of wetlands, comprising about 43 percent of the surface area of the State – more wetlands acreage than the rest of the United States combined. *See* U.S. Environmental Protection Agency, et al., *Alaska Wetlands Initiative Summary Report*, at 2 (1994).[4] About 66 percent of the wetlands in Alaska are found within Federally-managed land, about 23 percent within State lands, about 11 percent under Native ownership,[5] and less than 1 percent of these wetlands under private ownership. *Id.*

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[4] *Available at* www.epa.gov/owow/wetlands/pdf/alask.pdf (last visited September 21, 2008).

[5] The Federal government has long recognized the significance of wetlands regulation in Alaska. As discussed *infra*, the Alaska Statehood Act is intended to provide a mechanism for selecting certain Federally-owned lands for economic development and community expansion, as well as rural Alaska's needs for basic services and facilities, subsistence rights, and Capital Improvement Projects. The Ninth Circuit's ruling effectively ignores years of dialogue and agreements made between various stakeholder groups concerning the implementation of Clean

(Continued on following page)

A review of the percentage of wetland by geographic region shows the concentration of wetlands in different parts of the State. The areas with the highest percentage of wetlands are also the areas most likely to have active mines or mineral projects. The Corp issued wetlands delineation guidelines specific to Alaska in September 2007, which explain the distribution of wetlands in the State:

> Wetlands occupy an average of 61 percent of the Northern and Western Alaska. They are least abundant in the Brooks Range . . . and most abundant . . . (up to 83 percent of the land area) in the arctic foothills and coastal plain, and in the Yukon-Kuskokwim and Selawick-Kobuk deltas. More than half of all Alaska's wetlands are located in the Northern & Western subregions. . . . Approximately 44 percent of Interior Alaska is wetlands. . . .

U.S. Army Corps of Engineers, Regional Supplement to the Corps of Engineers Wetlands Delineation Manual: Alaska Region (Version 2.0), at 4-6 (September 2007) ("Delineation Guidelines").[6] A map illustrating the Corps' delineation appears at page 5 of the Delineation Guidelines ("Corps Map").

Water Act Sections 402 and 404 in Alaska. *See, e.g., Alaska Wetlands Initiative Summary Report*, at 27-28.

[6] *Available at* http://handle.dtic.mil/100.2/ADA473823 (last visited September 21, 2008).

Because 43 percent of Alaska's land mass is classified as wetlands, all mining projects encounter wetlands. What makes the Ninth Circuit's decision particularly harmful to Alaska is that the majority of non-coal mines in Alaska are located in the subregions of Alaska with the highest concentration of wetlands. The majority of non-coal mines in Alaska are located in the Northern, Western, and Interior subregions. *See Alaska Department of Natural Resources, Division of Mining, Land & Water*, Large Mine Permitting, http://www.dnr.state.ak.us/mlw/mining/largemine/index.htm (last visited September 21, 2008). There are eleven non-coal mines in Alaska listed on the Division of Mining, Land & Water's index. Eight of the locations are in the Northern, Western, or Interior subregions. *See* Corps Map. The remaining three mines are located in the Southeast subregion. Eight out of eleven mines or large projects are located in the subregions of Alaska with the highest concentration of wetlands. As the Corps Map illustrates, the Northern, Western, and Interior subregions contain the majority of the land mass in Alaska. The Northern and Western subregions contain over half of Alaska's wetlands, but have less than half of Alaska's land mass. Any mine or project in the Northern or Western subregion is likely to encounter a very high percentage of the affected land being classified as wetlands. The two mineral projects mentioned by Petitioner State of Alaska in their Brief for the Petition for Certiorari, are in the Western subregion. Reply Br. for Pet. State of Alaska for Pet. for Cert. at 7 & n.2. These are projects that the State

anticipates may face Clean Water Act tailings disposal issues similar to those faced by the Kensington project. The Western subregion has a higher percentage of wetlands compared to the Southeast subregion, the location of the Kensington project. *See* Delineation Guidelines at 6. Thus, the next two likely large mining projects in Alaska will have even less land available for alternatives that avoid wetlands.

When the geographic analysis is expanded to include producing mines, developing projects and significant exploration projects, the relationship between areas of wetlands concentration and significant mineral deposits is closer. The Alaska Minerals Commission identified 27 such projects. *See* Report of the 2008 Alaska Minerals Commission.[7] The Alaska Minerals Commission developed a map showing the geographic location of each project in its 2008 report ("AMC Map"). Of the seven developing mineral projects and producing mineral projects for non-coal resources, five are located in one of the Western, Northern or Interior subregions. Of the twenty-six significant exploration projects for non-coal minerals, twenty four are in the Western, Northern and Interior subregions. The AMC Map shows that significant mines are widely disbursed in Alaska. Active large-scale mining occurs as far north and west as the Red

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[7] http://www.commerce.state.ak.us/oed/minerals/pub/minerals report2008_web.pdf (last visited September 21, 2008).

Dog Mine, as far east as the Pogo Mine, and as far south as the Greens Creek Mine.

B. The Implications of the Ninth Circuit's Holding on Alaska are Substantial as No Legal Difference Exists Between Lakes and Wetlands under the Clean Water Act.

While the facts in this case are somewhat unusual, its implications in Alaska are far-reaching. The Clean Water Act extends to not just traditional navigable waters (such as lakes) but also to all wetlands or streams with a "sufficient nexus" to navigable waters to affect their "integrity." *Rapanos v. United States*, 547 U.S. 715, 781-82 (2006) (Kennedy, J., concurring in the judgment). Thus, most Alaska wetlands become subject to the Ninth Circuit's interpretation of the Clean Water Act, making such areas off limits to the deposition of mine tailings because such tailings could never meet Clean Water Act Section 402 requirements. The implications for the mining industry in Alaska and the resource and economic benefits that flow from the industry are staggering.

As the Court in *Rapanos* observed, to determine whether wetland areas fall under the jurisdiction of the Clean Water Act, a party must determine, in the first instance, whether the areas in question are "waters" in the ordinary sense of containing a relatively permanent flow; and (if they are) whether the

wetlands in question are "adjacent" to these "waters" in the sense of possessing a continuous surface connection. *Rapanos*, 547 U.S. at 742. In this sense, whether or not an area contains open water or wetland bears little on whether an area constitutes Federally-regulated wetland under the Clean Water Act.[8]

The Ninth Circuit's rule effectively swallows vast areas of Alaska and renders it technically impossible to place mine tailings in a broad range of areas, even if such areas are highly remote, and do not contain open water or a lake environment. Such a result is particularly problematic in view of the over 30 years of placement of tailings in such wetland areas, and ongoing monitoring and restoration activities associated with these areas under the regulatory schemes developed by the Corps and EPA. The Ninth Circuit's ruling would also likely significantly impact Alaska's mining industry, making various large mining projects infeasible or highly problematic without justification or root in congressional intent.

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[8] Justice Scalia's opinion in *Rapanos* recognized the complexity and ambiguity involved in making such determinations. 547 U.S. at 727-29 (describing Corps' variable enforcement practices based on vague definitions). This burden is borne heavily by the applicant or party. *Id.* at 721 (reciting burden imposed for permitting and enforcement actions under Clean Water Act).

II. IMPLEMENTATION OF THE NINTH CIRCUIT'S RULING WOULD CURTAIL MINING OPERATIONS IN ALASKA IMPACTING ESSENTIAL COMMUNITY AND ECONOMIC DEVELOPMENT IN RURAL AREAS

Most large mine projects in Alaska are located in highly remote, rural areas with limited access. The remoteness of these locations adds to project costs and makes mining processes technically difficult to conduct. Of the five developing mineral projects and producing mineral projects on the AMC Map in the Western, Northern, or Interior subregions, four projects are not located on the road system in Alaska. The producing mines required construction of lengthy trajectories to the road system or to port facilities and the developing projects will require the same effort. Of the 26 significant exploration projects, 21 are not located near the road system in Alaska. Lack of road access is one factor that makes mining projects in Alaska more expensive than other parts of the United States. Regulations requiring significant additional costs have a negative impact on the feasibility of a mine in Alaska.

The location of large mines in and around wetland areas presents significant challenges for mining companies attempting to avoid placement of tailings on tundra or other areas that typically constitute jurisdictional wetlands. Application of Clean Water Act Section 402 to tailings placement in Alaska would have far-reaching economic and practical impacts

which Congress did not intend and the Ninth Circuit failed to consider in overturning the agencies' Clean Water Act regulations.

A. Mine Tailings Cannot Meet Clean Water Act Section 402's Effluent Limitation Guidelines.

The Ninth Circuit's statutory construction of the Clean Water Act renders tailings ponds not permittable under the Clean Water Act in a wide range of situations. That is because EPA has promulgated effluent limitation guidelines for a vast number of substances commonly present in the excess rock and dirt from mines located throughout the country. As discussed above, mine tailings by their very nature contain high levels of total suspended solids and other process materials. It is for this very reason that mining operators seek to find practicable locations to store these materials, where such storage areas can be capped and isolated from the local environment. Under the Ninth Circuit's reading of the Clean Water Act, the tailings produced by all such mines in Alaska would be subject to effluent limitations, even though mine tailings cannot possibly meet those limitations and despite the ability of mining companies to effectively cap, contain, and restore tailings ponds.

B. Upland Stacking of Mine Tailings on Converted Wetlands is Not Feasible in Many Circumstances.

One potential solution posited to avoid placement of mine tailings in low lying wetland areas is to "dry stack" tailings in upland areas. Dry stacking is a process whereby tailings are unsaturated, moved by a conveyor or truck, and stacked in a designated area, for example, a converted wetland. *See* Mining Foundation of the Southwest, "New Environmental Management: Dry Tailings – An Alternative to Conventional Tailings Management," 2 Natural Resources Impact, No. 3 (2006).[9]

The remoteness, topography, climate, and presence of wetlands in Alaska makes it extremely difficult, if not impossible, to implement the dry stacking technique in most areas of Alaska. The Alaskan landscape, where large mining operations occur, is so heavily dotted with wetlands and streams that it is virtually impossible to avoid these areas. Furthermore, given extreme precipitation, including high snowfall and related runoff during spring breakup, placing tailings in upland areas presents potentially significant economic[10] and technical challenges for many large mines. Conversely, a tailings impoundment

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[9] *Available at* http://www.mge.arizona.edu/pdf/MFSW_vol2_no3_ver1.pdf?PHPSESSIDD=bec59fef13c91fd3c649f66b0c6f4aa6.

[10] Coeur Alaska, Inc.'s Pet. for Writ of Cert. Reply Br. at 9 (comparing cost of storage on converted wetlands to cost of storage as allowed by the Corp permit for Kensington Mine).

constructed in low-lying areas such as those containing wetlands is technically and economically efficient to implement. Such an impoundment is securely walled off – and it ensures that the solids and minerals in the tailings will not flow into a nearby water supply.

It makes no sense to uphold a ruling of the Court of Appeals which overturns a disposal practice permitted and approved by the Corps and EPA for many years for an alternative method of disposal that is less technically and economically efficient without significant gain for the goals of the Clean Water Act.

C. The Practical Impact of the Ninth Circuit Rule Would Frustrate the Goals of the Alaska Statehood Act.

Upholding the Ninth Circuit's view of the Clean Water Act is inconsistent with Congressional intent that Alaska be permitted to develop its mineral resources in order to support state government. *See Astoria Fed. Sav. & Loan Assoc. v. Solimino*, 501 U.S. 104, 109 (1991) (recognizing harmonization of different statutes is core principle of statutory interpretation). Faced with congressional opposition to statehood because of concerns about Alaska's economy and the potential need for subsidization, Congress specifically provided support for development of Alaska natural resources in approving Statehood. The Ninth Circuit's holding undermines Congress' intent to support Alaska resource development.

During the debates leading to the enactment of the Alaska Statehood Act, Pub. L. 85-508, 72 Stat. 343, July 7, 1959, one of the principal objections to Alaska's admittance into the Union was the fear that the territory was economically immature and would be unable to support a state government. For example, opponents of statehood claimed that "Alaska is not capable of sustaining statehood unless it is heavily subsidized by the other 48 States of the Union." 104 Cong. Rec. 9,498 (1958) (statement of Rep. Smith). Similarly, another opponent of statehood argued that "[t]he prevailing doubt of Alaska's ability to support itself is evidenced by the generous special considerations which are made for it in this statehood act." 104 Cong. Rec. 12,297 (1958) (statement of Sen. Talmadge).

The congressmen who favored statehood conceded that it would impose an additional financial burden on the territory, but they maintained that the Statehood Act sufficiently provided for Alaska's financial wellbeing. A healthy minerals industry was seen as a necessity to meet the economic challenge of statehood. Two provisions of the Statehood Act were designed specifically to assist the Alaska minerals industry: Sections 6(a) and 6(i) of the Act. Together these sections of the Act provided a very generous land grant to the State (the right to select 103,350,000 acres of land) and the requirement of a leasing system for minerals disposition from this

land. The land grant of 103,350,000 acres was perceived by these congressmen as an endowment which would yield the income that Alaska needed to meet the costs of statehood. Representative Dawson said that:

> All grants include the mineral rights, but these rights must be retained by the State if the lands pass into private ownership. In other words, the mineral rights will always belong to the people of Alaska, and never to private individuals. . . .
>
> These provisions are the foundation upon which Alaska can and will build to the enormous benefit of the national economy shared by her sister States. We cannot make Alaska a "full and equal" State in name and then deny her the wherewithal to realize that status in fact.

104 Cong. Rec. 9,361 (1958).

The importance of mineral revenue to the new state is also highlighted by the following colloquy between Representative Miller and Alaska Territorial Senator William Egan:

> Miller: Do you see where you would get much income out of this 103 million acres you might select around, bearing in mind most of the forests and good land has been set aside by the Government now, or by the military? How much income would you derive from that to begin with?

> Egan: As to how much income would be derived, that would be entirely problematical, depending on the values that would be found there. . . . There are known deposits of almost every type of mineral.
>
> . . .
>
> I feel there would be development. . . .

Statehood for Alaska: Hearings Before the Subcomm. on Territorial and Insular Affairs of the House Comm. on Interior and Insular Affairs, 85th Cong., 1st Sess. 201-02 (1957) (remarks of Rep. Miller and William Egan, Alaska Territorial Senator and President of the Alaska Constitutional Convention); *see also* 104 Cong. Rec. 9,360-61 (1958) (further remarks of Rep. Dawson; remarks of Rep. O'Brien); 104 Cong. Rec. 12,012 (1958) (remarks of Sen. Jackson).

Congress passed the Alaska Statehood Act, Pub. L. 85-508, 72 Stat. 343, on July 7, 1959. Following a Declaration from President Eisenhower in early January 1959, Alaska joined the Union.

The primary purpose of the statehood land grants contained in section 6(a) and (b) of the Statehood Act was to ensure the economic and social well-being of the new state. *Udall v. Kalerak*, 396 F.2d 746, 749 (9th Cir. 1968), *cert. denied*, 393 U.S. 1118 (1969); *United States v. Atlantic Richfield Co.*, 435 F. Supp. 1009, 1016, 1021 n.47 (D. Alaska 1977), *aff'd*, 612 F.2d 1132 (9th Cir.), *cert. denied*, 449 U.S. 888 (1980); *see also Amoco Prod. Co. v. Village of Gambell, Alaska*, 480 U.S. 531, 549 & n.17 (1987) (public land

allocation began with the Alaska Statehood Act). There is little case law exploring the purpose of sections 6(a), 6(b) and 6(i) of the Alaska Statehood Act. In addition to the broad statements about Congressional purpose in these two cases, there is a decision of the Alaska Supreme Court, *Trustees for Alaska v. State*, 736 P.2d 324 (Alaska 1987), that focuses specifically on the reasons for sections 6(a), 6(b) and 6(i) in the Statehood Act. The House Report summarizes the purpose of the selection rights in section 6(i) of the Statehood Act:

> If the resources of value are withheld from the State's right of selection, such selection rights would be of limited value to the new State. The committee members have, therefore, broadened the right of selection so as to give the State at least an opportunity to select lands containing real values instead of millions of acres of barren tundra. To attain this result, the State is given the right to select lands known or believed to be mineral in character (sec. 6(i)).

H.R. Rep. No. 624, 85th Cong., 1st Sess. (1957), *reprinted in* Vol. 1, Alaska Statutes, "History of Alaska Statehood," at 7 (2006).

The grant ultimately provided in sections 6(a) and (b) of the Statehood Act was one of unprecedented size whether considered either absolutely or as a percentage of the total land area of the State. *Id.* As the colloquy between Representative Miller and William Egan suggests, another rationale for the

unprecedented size was that the federal government had already reserved the most valuable land and the new state would, in effect, have second choice. In the House, Representative Saylor said that "the choice areas, more than 95 million acres, have been reserved for Federal agencies." 104 Cong. Rec. 9,340 (1958). In Senate discussion of the federal reservations, Senator Robertson read a portion of the House report on the Act: "[T]his tremendous acreage of [federal] withdrawals might well embrace a preponderance of the more valuable resources needed by the new State to develop flourishing industries with which to support itself and its people." 104 Cong. Rec. 12,019 (1958). Thus, the large grant of 103 million acres was deemed necessary because the lands available for state selection were perceived to be only marginally productive.

Furthermore, Congress recognized that the agricultural potential of the statehood grant land was limited. In debate, Senator Byrd commented: "In all of the more than 365 million acres of land in Alaska, only 2 million, or about one-half of 1 percent, are arable." 104 Cong. Rec. 12,336 (1958). Because Congress realized that agricultural development would not yield the revenue that Alaska would need to support statehood, the Act contained the provision granting the new state title to the mineral estate underlying the land grants. Senator Kuchel said in debate:

> I believe, however, on the basis of the values of property in Alaska as they have been estimated, the tremendous wealth in the ground in minerals, . . . the State of Alaska will be able to make maximum use of the property which it will obtain under the bill from the Federal Government. This provision constitutes one additional assurance. I feel sure that economically the new government will succeed.

104 Cong. Rec. 12,035 (1958).

Thus, Congress recognized that the large statehood land grant and the grant of the underlying mineral estate were important means by which the new state could meet the financial burdens of Statehood. Congress granted Alaska the mineral estate with the intention that the revenue generated therefrom would help fund the new state's government. *See id.* The leasing restriction in section 6(i) was intended to further the goal of state revenue production. *See Trustees for Alaska v. State*, 736 P.2d at 335-337.

Congressional assumptions regarding the value of mining to Alaska have borne out to be true. The mining industry contributed $4 billion to Alaska's economy in 2007, consisting of $275 million in exploration, $274 million in development, and $3.4 billion in gross mineral production value. Mot. for Leave to File Br. Amicus Curiae and Br. Amicus Curiae of Pacific Legal Foundation, et al. at 7-11 (citing to Alaska Miners Association, *The Economic Impacts of*

Alaska's Mining Industry (2008)).[11] The mining industry paid corporate income taxes and mining license taxes of $150 million to the State of Alaska in fiscal year 2007. *See* Alaska Department of Revenue Tax Division, *Revenue Sources Book* (Fall 2007) at 19, Fig. 3.3.[12] Upholding the Ninth Circuit would have the effect of substantially curtailing the availability and use of lands in Alaska for mining because, as discussed above, it would be impossible in many cases for large mines in remote areas to dispose of mine tailings in an economic fashion. This would significantly restrict industrial development on these lands contrary to congressional intent as set out in the Alaska Statehood Act.

Achieving the goals, as expressed by the congressional intent, of the Clean Water Act and the Alaska Statehood Act, is the task of the agencies that regulate water quality in this country. The Corps and the EPA have achieved a program for regulation of mine tailings that balances the goals of the Alaska Statehood Act and the Clean Water Act. In this matter, the Corps issued a permit for tailings storage at the Kensington Mine in Alaska that is consistent with the agencies' program. The agencies developed the

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[11] *See also* Coeur Alaska, Inc.'s Pet. for a Writ of Cert. at 19-20 (mineral industry production in Alaska and other states); State of Alaska Pet. for a Writ of Cert. at 29-30, n.8 (employment growth in mining industry in Alaska).

[12] *Available at* https://www.tax.alaska.gov/programs/documentviewer/viewer.aspx?255.

program and worked though the application of the program for many years.[13] In absence of specific Congressional intent disallowing the longstanding program, this Court should recognize the expertise of the agencies by reversing the decision of the Court of Appeals for the Ninth Circuit.

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[13] State of Alaska Pet. for a Writ of Cert. at 6-10 (explanation of the history of the adoption of the Army Corp regulations allowing the permit issued for the Kensington Mine); Coeur Alaska, Inc.'s Pet. for a Writ of Cert. at 29-30.

CONCLUSION

Given the unique geographical and economic landscape of Alaska, the Ninth Circuit's decision thwarts the purpose of the Alaska Statehood Act, Congress' intent in enacting the Clean Water Act, and the EPA and Corps' practical and experience-laden interpretations of the Clean Water Act. For these reasons, Amicus CAP asks the Court to overturn the Ninth Circuit's ruling and affirm the District Court below.

Respectfully submitted,

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